



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2013-0147]

Driver Qualifications: Skill Performance Evaluation; Virginia Department of Motor Vehicles' Application for an Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to grant an exemption to the Virginia Department of Motor Vehicles (Virginia), on behalf of truck and bus drivers who are licensed in the Commonwealth of Virginia and need a Skill Performance Evaluation (SPE) certificate from FMCSA to operate commercial motor vehicles (CMVs) in interstate commerce. The exemption will enable Virginia-licensed drivers subject to the Federal SPE requirements under 49 CFR 391.49, to fulfill the Federal requirements with a State-issued SPE. The State-issued SPE will be based on standards, processes and procedures comparable to those used by FMCSA, and the State will maintain copies of all evaluation forms and certificates issued to enable FMCSA to conduct periodic reviews of the State's program. Virginia licensed drivers who receive the State-issued SPE are allowed to operate CMVs in interstate commerce, anywhere in the United States.

DATES: The exemption is effective [July 8, 2014]. The exemption will expire on [July 8, 2016] but may be renewed.

FOR FURTHER INFORMATION CONTACT: Ms. Eileen Nolan, Office of Carrier, Driver and Vehicle Safety, Medical Programs Division, (202) 366-4001, Federal Motor

Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

Electronic Access:

The FMCSA received 2 comments in response to the July 9, 2013 (78 FR 41187), notice requesting public comment on Virginia's application for an exemption. A copy of Virginia's application is in the docket referenced at the beginning of this notice and any comments or additional information submitted to the Agency following publication of this notice may be accessed online through <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or to Room W12-140, DOT Building, New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Document Management System (FDMS) is available 24 hours each day, 365 days each year.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement for the FDMS published in the Federal Register published on January 17, 2008 (73 FR 3316), or you may visit <http://edocket/access.gpo.gov/2008/pdf/E8-785.pdf>.

Background:

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions

from certain parts of the Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the Federal Register (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the Federal Register (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

Virginia's Exemption Application

The Virginia DMV requested an exemption from 49 CFR 391.49 concerning FMCSA's SPE process for drivers who have experienced an impairment or loss of a limb, on behalf of CMV drivers licensed in the Commonwealth of Virginia. Instead of requiring such drivers to apply to FMCSA for an SPE, Virginia would establish its own SPE program essentially identical to the current FMCSA program. Virginia would establish an application process modeled on the FMCSA process and State personnel who have completed SPE training identical to that of FMCSA personnel currently administering the Federal SPE program would conduct the skill evaluation following the same procedures

and testing criteria used by FMCSA. If the driver passed the skill evaluation, the State would issue the SPE certificate. Virginia would maintain records of applications, testing, and certificates issued for periodic review by FMCSA.

On July 9, 2013, FMCSA published a notice in the Federal Register requesting public comment on Virginia's exemption application (78 FR 41187). The Agency received comments from the Advocates for Highway and Auto Safety (Advocates) and the American Trucking Associations (ATA).

The Advocates expressed opposition to the exemption, stating:

“the VA DMV application does not request an exemption from any particular driver qualification standard or requirement on behalf of any particular driver or class of drivers, but instead seeks to transfer federal authority to grant or deny SPE certifications from federal officials to the VA DMV Commissioner. Because the exemption provisions of federal law are not intended to permit a transfer of federal administrative and regulatory authority to state officials, Advocates opposes the application.”

The ATA supports the concept of the exemption but expressed concerns regarding the precedent the exemption might set for other States that are not prepared to handle the SPE process. The ATA believes FMCSA needs to ensure any subsequent State authorities that may be granted a similar exemption adhere to strict standards for program design and implementation. The ATA asked whether drivers in an authorized State would be required to apply in that State or would the Federal SPE process still be available? The ATA also asked whether a driver who fails the SPE test in an authorized State could reapply to FMCSA?

FMCSA Response

The FMCSA acknowledges Advocates' concerns, but disagrees with its conclusions. The Virginia DMV is seeking an exemption on behalf of a class of drivers, and the proposed exemption would not involve the delegation of Federal authority to Virginia.

Currently, 49 CFR 391.49 prescribes alternative physical qualification standards for drivers with a loss or impairment of a limb(s). A person who is not physically qualified to drive under 49 CFR 391.41(b)(1) or (b)(2) concerning loss of limbs or impairment of limbs, respectively, may apply for an SPE from the FMCSA Division Administrator in the State in which the driver is licensed. The current regulations does not provide an alternative to an FMCSA-issued SPE certificate for drivers who have experienced the loss or impairment of a limb(s). In the absence of an FMCSA-issued SPE certificate, such drivers are prohibited from operating CMVs in interstate commerce.

The FMCSA continues to view Virginia's request as an appropriate application for an exemption on behalf of Virginia-licensed drivers who have experienced the loss or impairment of a limb, and wish to operate CMVs in interstate commerce. Through the exemption process, FMCSA would accept a State-issued SPE certificate in lieu of requiring these drivers to obtain an FMCSA-issued SPE certificate, as specified in the current regulations. Therefore, the exemption would provide an alternative to the current regulations for the class of drivers described by Virginia's application. As such, Virginia's request is no different from other applications submitted by entities on behalf of a class of persons or class of carriers. Under this scenario, the State is not seeking relief from any rules applicable to the State, rather it is seeking relief on behalf of the

class of drivers who would otherwise have to seek individual exemptions to obtain a variance from the Federal SPE requirement.

FMCSA acknowledges that the same terms and conditions of the exemption that ensure it would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulations, may have led Advocates to conclude the exemption represents a transfer of authority from FMCSA to the State. However, no such transfer of authority would take place through the exemption. Each driver who has experienced a loss or impairment of a limb(s) remains subject to 49 CFR 391.49 and only the subset of such drivers who are licensed in Virginia may seek a State-issued SPE in lieu of the FMCSA-issued SPE certificate. The fact that the State would adhere to the same strict standards for the personnel administering the test and the same performance-based testing standards for each SPE applicant does not mean there is a transfer of authority. What the exemption provides is a streamlined alternative through which this limited class of drivers may pursue a State-issued SPE from the same entity that issued their driver's license rather than having to undertake a two-step process where the license is issued by the State and the SPE is issued by FMCSA.

The exemption is analogous to long-standing regulations governing the roles of (1) medical examiners who qualify drivers (49 CFR part 391, subpart E), and (2) State officials who can trigger FMCSA's emergency exemptions (49 CFR 390.23).

The Federal Motor Carrier Safety Regulations (FMCSRs) have long entrusted private medical personnel with the task of applying the Agency's medical standards to determine whether drivers are physically qualified to operate commercial motor vehicles (CMVs). No one contends that this amounts to a delegation of Federal authority to

private individuals. Agency rules simply specify the types of medical professional who may be “medical examiners” (as defined in 49 CFR 390.5) and accept (or ratify) their judgment as to whether a driver meets the physical qualification standards in 49 CFR part 391, subpart E. No Federal authority is transferred to medical examiners.

Similarly, while the relief from regulations provided by 49 CFR 390.23 is often triggered by the declaration of an emergency by a State official, FMCSA has not thereby delegated its exemption authority to the State. On the contrary, § 390.23 represents an FMCSA decision, made in advance of any particular incident, that events serious enough to qualify as an “emergency” justify regulatory exemptions for motor carriers and drivers providing “direct assistance” to supplement the “emergency relief” efforts of State and local governments, as those terms are defined in § 390.5. FMCSA has not delegated its authority to the States; it accepts (with rare exceptions) the factual conclusion of State officials that a given event qualifies as an “emergency” under Federal rules.

The exemption granted the Virginia DMV is of the same type. Because of Virginia’s well-documented training of its personnel to apply FMCSA’s SPE standards and its commitment to maintaining compliance with those standards, the Agency is simply accepting (and ratifying) the State’s conclusions about the applicant’s qualifications in the same way that it accepts the conclusions of medical examiners. But FMCSA retains and will exercise the authority to review Virginia’s adherence to the Federal SPE standards, just as it has undertaken to review the adherence of medical examiners to Federal qualification standards.

With regard to the ATA’s comments, FMCSA believes its oversight of the exemption process would ensure adherence to the terms and conditions of the exemption,

and provide for an effective FMCSA-Virginia partnership in streamlining the SPE process for Virginia-licensed drivers. If, for whatever reason, a Virginia-licensed driver would prefer not to opt for the streamlined SPE process, he or she may still apply for an FMCSA-issued SPE. However, FMCSA may still exercise its discretion and call upon the State licensing agency to provide assistance in conducting the road test needed to complete an SPE application, depending on the volume of applications.

In response to the ATA's question about drivers who fail the SPE certification process, the current regulations do not prohibit drivers from reapplying for SPE certification. In this case, FMCSA would work with the State to reevaluate a driver who fails to obtain a State-issued SPE. FMCSA would consult with the State for any SPE application from a Virginia-domiciled driver to determine whether the driver had previously applied for an SPE from the State and request the results of that application before making any decision in the matter.

Finally, FMCSA emphasizes that the Agency does not intend its decision to serve as pressure upon other States to take action to implement State-run SPE programs. Virginia is the first State to submit an application on behalf of its drivers to provide an alternative to the Federal SPE process. Other States are welcome to take similar actions if they believe it is appropriate to do so and they have the resources to meet terms and conditions comparable to those provided in this exemption.

FMCSA Decision

Based upon its analysis of the application, FMCSA has determined that there are no safety vulnerabilities associated with Virginia's request and that the exemption should be granted. The Agency has determined that the exemption will achieve a level of safety

equivalent to, or greater than, the level achieved by the current SPE requirements.

As indicated above, Virginia will establish its own SPE program essentially identical to the current FMCSA program. Virginia will establish an application process modeled on the FMCSA process. State personnel who conduct the skill evaluation will complete the same training as FMCSA personnel conducting the test and will follow the same procedures and testing criteria used by FMCSA. And Virginia will maintain records of applications, testing, and certificates issued for periodic review by FMCSA.

Because Virginia's program will be essentially identical to the current FMCSA program, FMCSA has concluded that the program will achieve the level of safety required by 49 U.S.C. § 31315.

Terms and Conditions of the Exemption

The FMCSA grants an exemption to the Virginia DMV on behalf of drivers who have experienced an impairment or loss of a limb, and are licensed in the Commonwealth of Virginia. The following terms and conditions apply to the State and any drivers who receive a State-issued SPE certificate.

- Virginia must establish and maintain its own SPE program essentially identical to the current FMCSA program.
- The State must establish an application process modeled on the FMCSA process and must submit information concerning the application process to FMCSA's Medical Programs Division for review.
- State personnel who conduct the skill test must complete SPE training identical to that of FMCSA personnel currently administering the Federal

SPE program.

- The skill evaluation and scoring for the SPE must be done using the same procedures and testing criteria used by FMCSA.
- Virginia must maintain records of applications, testing, and certificates issued for periodic review by FMCSA.
- Virginia must submit a monthly report to FMCSA listing the names and license number of each driver tested by the State and the result of the test (pass or fail).
- Each driver who receives a State-issued SPE must keep a copy of the certificate when driving, for presentation to authorized Federal, State, or local law enforcement officials.

Preemption of State Laws and Regulations

An exemption granted under the authority of 49 U.S.C. 31315(b) preempts State laws and regulations that conflict with or are inconsistent with the exemption. The

decision to grant Virginia's request amounts to automatic Federal ratification of the State issued SPE certificate and therefore prohibits other jurisdictions from requiring a separate FMCSA-issued SPE. The State-issued certificate must be treated as if it had been issued by FMCSA. Virginia-licensed drivers who receive the State-issued SPE are allowed to operate CMVs in interstate commerce, anywhere in the United States.

Issued on: July 1, 2014.

Anne S. Ferro,
Administrator.

[4910-EX-P]

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